Upper Great Lakes Pilots, Inc. *and* Captain Howard C. Dobbins and Upper Lakes Pilots Association, District No. 3, International Longshoremen's Association, Local 444, AFL–CIO, Party in Interest. Case 18–CA–11351

May 21, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On May 27, 1992, Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a brief in support of cross-exceptions and in reply to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their protected concerted activities, creating the impression that those activities were under surveillance, threatening to retaliate against employees for engaging in protected activities, and telling employees that they had been laid off because they had engaged in those activities. The judge also found that the Respondent violated Section 8(a)(2) by interfering with the administration of the Union and by rendering assistance and support to the Union. He further found that the Respondent violated Section 8(a)(3) by laying off and later discharging several employees in retaliation for their union activities. As threshold matters, the judge found, contrary to the Respondent's contentions, that the Board should assert jurisdiction over the Respondent, that the pilots employed by the Respondent were employees entitled to the protection of the Act, and that the Union was a labor organization within the meaning of Section 2(5).

In the main, we adopt the judge's findings and recommendations, although some issues warrant further discussion and analysis. We find, however, that the Respondent did not commit certain of the 8(a)(1) violations found by the judge. We also find, contrary to the judge, that the Respondent did not act unlawfully by laying off and later terminating the alleged discriminatees. Our discussion of those issues follows.

I. THE PILOTS' STATUS AS PROTECTED EMPLOYEES

A threshold issue before us is whether the pilots employed by the Respondent are protected by Section 7 of the Act, as the General Counsel asserts, or whether they are unprotected managerial employees, as the Respondent contends. The judge found that the pilots are protected employees. For the reasons set forth below, we agree with the judge.

The Respondent is an association of U.S. pilots who guide ships through Lakes Huron, Michigan, and Superior and the waterways that connect those lakes with each other and with Lake Erie. (Together, those bodies of water are referred to as ''District 3.'')[3] The Respondent is a corporation, and the pilots own all its stock. All the Respondent's officers and directors are pilots.[4] Each pilot is required to own at least one share of voting stock and two shares of nonvoting stock, but no pilot may own more than six shares of voting stock. During the relevant time period, the pilots owned varying amounts of voting stock, except for three of the pilots, who had not yet purchased any voting stock. Of the 54 outstanding shares of voting stock, 29 were owned by the corporate officers and directors.

The Respondent argues that the pilots' stock ownership precludes their being considered employees protected by the Act. The Respondent contends that each

[1] On the opening day of the hearing, the judge permitted the General Counsel to amend the complaint to include allegations that the Respondent, in early January 1990, violated Sec. 8(a)(1) by interrogating an employee concerning his protected concerted activities, creating the impression of surveillance, and threatening reprisals. See fn. 5 of the judge's decision. No party has excepted to that ruling.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In this regard, we note that the judge broadly discredited the Respondent's witnesses, especially Senff, Sciullo, O'Brien, and Madjiwita, all on demeanor grounds. Yet the judge's opinion contains numerous factual findings that are consistent with, and in some cases based entirely on, those witnesses' testimony. Apparently, then, the judge did not mean that none of their testimony was credible. Accordingly, we rely in some respects on the testimony of the discredited individuals, but only when it (1) was implicitly credited by the judge, (2) is consistent with the testimony of credited witnesses or with documentary evidence, (3) is an admission against interest, or (4) is relied on by the party against whom we are resolving a particular issue.

The correct citation to *American National Stores* (see part II,I,1 of the judge's decision) is 195 NLRB 127 (1972).

[3] Pursuant to an understanding between the U.S. and Canadian governments, Canadian pilots also provide services to ships in District 3. Roughly 19 percent of all revenues derived from providing pilotage services are, at least theoretically, earmarked for the Canadian operations.

[4] The officers are appointed by the board of directors. The record does not establish what powers and duties were held by the nondirector officers.

Directors may be removed and replaced by a majority vote of the voting stock.

pilot, as a shareholder, had some measure of control over its operations, and that the pilots as a group had complete control over its operations and management. According to the Respondent, the pilots' interest gives them an ''effective voice in the formulation and determination of corporate policy,''[5] and consequently they are unprotected managerial employees.

The judge rejected the Respondent's contentions. He found that no pilot held an amount of stock sufficient to divest him of employee status,[6] that the corporate bylaws permit an entrenched board of directors and effectively deny nonmanagement shareholders the power to amend the bylaws.

We agree with the judge's conclusion, but not with all of his underlying analysis. Although no single pilot owned enough stock to determine the Respondent's corporate policy, that fact alone does not end the inquiry. The pilots *as a group* owned *all* the Respondent's voting stock; thus, *as a group*, they could effectively determine corporate policy. As the Respondent points out, the Board in a number of representation cases has excluded, from bargaining units of other employees, shareholder-employees whose collective holdings of their employers' stock gave them an effective voice in formulating and determining policy.[7] As the Board specifically noted in *Brookings Plywood*, where a large number of employees own a large portion of their employer's stock, they may collectively influence management policies even though no one of them would be likely to affect the making of corporate policy by himself.[8] The judge's reliance on *Airport Distributors* therefore is misplaced, because the employee in question in that case (a 10-percent stockholder) apparently was the *only* employee who owned shares of the employer's stock.

We find, however, that the judge reached the correct result here. The Respondent's directors and officers during the relevant time period together owned more than half of the voting stock. The rest of the pilots, even acting in concert, could not outvote the officers and directors. On the basis of their stock ownership, then, the minority shareholders lacked an effective voice in the formulation and determination of corporate policy. The record contains no evidence that those individuals effectively determined the Respondent's policies, or that they could have replaced the officers or directors in order to gain control of corporate decisionmaking.[9] It is well settled that stock ownership alone does not deprive an employee from the protection of the Act,[10] and we agree with the judge that the pilots' job functions are not those of managerial employees. We therefore find that the pilots who were not officers or directors of the Respondent were not unprotected managerial employees, and that they were entitled to the protection of the Act.[11]

II. THE 8(A)(2) VIOLATIONS

The pilots are represented by Upper Lakes Pilots Association, District No. 3, Local 444 of the International Longshoremen's Association (the Union). The judge found that the Respondent violated Section 8(a)(2) by contributing clerical assistance and support to the Union.[12] We adopt the judge's finding. In so doing, we note that, according to the testimony of Pilot Peter Madjiwita, the Union's ex-president, that assistance consisted of helping to write letters, taking telephone messages, and paying the Union's bills (out of

[5] *Brookings Plywood Corp.*, 98 NLRB 794, 798 (1952).

[6] The judge cited *Airport Distributors*, 280 NLRB 1144, 1150 (1986).

[7] *Sida of Hawaii, Inc.*, 191 NLRB 194, 195 (1971); *Red & White Airway Cab Co.*, 123 NLRB 83, 85 (1959); *Brookings Plywood*, supra, 98 NLRB at 798–799. In excluding the shareholder-employees, the Board relied in part on the fact that those individuals enjoyed preferential treatment over other employees, or otherwise had divergent interests. Although the Board in those cases simply excluded the shareholder-employees from units with other employees, and did not squarely hold that they were unprotected managerial employees, that seems to have been the Board's underlying rationale. See *Florence Volunteer Fire Department*, 265 NLRB 955, 956 (1982). See also the Supreme Court's discussion of the Board's evolving treatment of managerial employees in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275–289 (1974). But see *Everett Plywood & Door Corp.*, 105 NLRB 17, 19 (1953), in which the Board expressly found that stockholder-employees were protected by Sec. 7, even though they collectively held more than 75 percent of the employer's stock, where (like the pilots) *all* employees were stockholders. In that case, the Board followed its consistent practice and excluded from the bargaining unit employee-shareholders who were directors of the corporation. Id. at 19–20.

[8] 98 NLRB at 798.

[9] See, e.g., *S-B Printers*, 227 NLRB 1274, 1275 (1977).

The Board has excluded groups of shareholder-employees from bargaining units even though they collectively owned less than half of the employers' stock. *Brookings Plywood*, supra; *Union Furniture Co.*, 67 NLRB 1307 (1946). In neither case, however, was the situation now before us presented; i.e., there was no showing that the corporate officers and directors collectively owned a controlling block of stock.

Florence Volunteer Fire Department, supra, cited by the Respondent, is unlike this case. In *Florence*, each of the firefighters had an equal voice in management decisions, and no policy could be set or implemented without ratification by a vote of the membership. Those circumstances do not exist here.

[10] *Airport Distributors*, supra, 280 NLRB at 1150.

[11] A fortiori, Pilots Aho, Ojard, and Soderquist, who had not yet purchased stock, were protected employees.

[12] The judge also correctly found that the Respondent interfered with the administration of the Union, in violation of Sec. 8(a)(2), when the Respondent's officers and directors took part in the Union's vote on the Respondent's 1990 contract proposal. See *Nassau & Suffolk Contractors' Assn.*, 118 NLRB 174, 183–184 (1957).

the Union's funds).[13] Contrary to the Respondent, we do not find those services de minimis.[14]

However, we do not rely on the judge's finding that the Union had no independent resources, in view of record testimony that the pilots each pay around $800 annually in dues to the Union. Nor do we rely on his statement that Madjiwita could not say what the Union paid for its office space. Madjiwita admitted that he had not known the amount of rent during the pretrial investigation of the case, but he estimated that it was around $150.

III. THE 8(A)(1) AND (3) ALLEGATIONS

On April 11, 1990,[15] the Respondent laid off the seven pilots with the least seniority, for the stated reason that the low level of shipping traffic was insufficient to support the full complement of pilots. Although one of the pilots (Skorich, the most senior of those who were laid off) was later recalled, the layoffs of the remaining six were converted to permanent discharges on May 22, again ostensibly because of a shortage of work. The complaint alleges that the layoffs and discharges violated Section 8(a)(3) and (1). There is no allegation or finding that the Respondent violated Section 8(a)(5) in any respect.

The judge found that the layoffs and discharges of the pilots violated Section 8(a)(3) and (1) as alleged. He found, first, that the General Counsel had established a prima facie case that the layoffs were motivated by animus directed toward the concerted protected activities of some of the less senior pilots, and especially by the pilots' rejection of the Respondent's 1990 contract proposal. The judge based his finding in part on several statements attributable to the Respondent that he found to violate Section 8(a)(1), and in part on unidentified ''profane and browbeating remarks from several board members against [the less senior pilots].'' He then found that the Respondent had failed to show that it would have laid the pilots off even in the absence of their protected activity.[16] The Respondent excepts to the judge's findings. We find merit in several of the exceptions.

In the decade prior to 1990, the level of shipping activity on the Great Lakes had declined significantly. The number of ships handled annually in District 3 fell from 869 in 1979 to 420 in 1985. Traffic volume roughly stabilized for a time—449 ships were handled in 1986, 418 in 1987, and 437 in 1988—before dropping sharply again to 372 in 1989. The reduced shipping levels, and the corresponding loss of work for pilots, was a matter of continuing concern for the Respondent, which tried to adapt by reducing the number of pilots through attrition. During the 1989 shipping season, however, the Respondent avoided a layoff only by obtaining the Union's approval for an increase in the number of mandatory days off for the pilots, for which they were paid only at the end of the season.[17]

During the winter of 1989–1990, several of the less senior pilots held a number of informal meetings to discuss their concerns over the Respondent's expenses and other matters related to their employment. One of the early meetings was held in a Duluth restaurant, and the group came to be known by the name of the restaurant—the ''Chi Chi Boys.'' The group retained an attorney to investigate some of their concerns; they also complained to the Coast Guard and to several congressmen. Their activities were known to the Respondent.

In early January, Pilot Howard Dobbins spoke by telephone with Richard Olsen, one of the Respondent's directors. According to Dobbins' credited testimony, Olsen said that he had heard that Dobbins had been connected with the Chi Chi Boys, and with the group's contacting an attorney. Dobbins replied that he had been contacted about an attorney, but knew nothing about the Chi Chi Boys. (Dobbins had not heard of the term ''Chi Chi Boys'' before his conversation with Olsen.) Olsen stated that Pilots Skorich, Opack, Soderquist, Balanda, and Evavold had been at meetings, and that Dobbins had been mentioned as being ''with those mavericks in Duluth.'' Olsen asked Dobbins what the group thought they were going to gain ''by all this,'' and Dobbins answered that the pilots' main concern was with where the revenues were going and what they could do to cut costs. Olsen said that he had a few ideas of his own about how to cut costs, and would let those ideas be known at the spring meeting of the board of directors. Dobbins testified that when Olsen made the latter comment, his voice took

[13] As we have noted, Madjiwita was broadly discredited. The judge's findings, however, were consistent with Madjiwita's testimony. Also, we note that the Respondent contends that Madjiwita should be credited.

[14] The clerical services were not provided directly by the Respondent, but by employees of General Business Services (GBS), a firm owned by the Respondent's attorney. However, to the extent those employees were working for the Respondent (though employed by GBS), their contribution of clerical services to the Union was the equivalent of a direct contribution by the Respondent. In any event, the Respondent has excepted to the judge's finding of this violation solely because it contends that the services were inconsequential, not because they were provided directly by employees of GBS.

Member Raudabaugh believes that the appropriate test for determining whether there was unlawful support within the meaning of Sec. 8(a)(2) is whether the acts of assistance went beyond reasonable cooperation. In his view, the acts outlined above, considered collectively and in the context of the 8(a)(2) violation discussed in fn. 12 above, establish the violation in this respect under that test.

[15] Unless otherwise noted, all dates are in 1990.

[16] *Wright Line*, 251 NLRB 1083 (1980).

[17] In fact, because of the dropoff in traffic and in revenue, the Respondent in October 1989 laid off several support staff as well as two pilot trainees and two ''contract pilots'' (individuals who worked sporadically to handle peak traffic loads). None of the regular pilots was laid off at that time, however.

on a hard, harsh tone. Olsen also asked Dobbins who had contacted him about meeting with an attorney. Dobbins replied that he could not tell Olsen who had talked to him. Olsen said it was probably Pilot Connaughton, but Dobbins said it was not. Olsen suggested that Dobbins go and meet with the attorney just to see what the group had to say and what their plans were.

In February and March, the Respondent and the Union exchanged contract proposals for the coming 1990 season. The Union began by asking for, inter alia, a 20-percent salary increase, an increase in the pilots' per diem, and an increase in rest days from 5 to 7 per month, with pay. The Respondent countered with an offer of an 8-percent salary increase, an increase in the per diem from $40 to $42, and an increase in rest days from 5 to 7 per month from June through October, but with payment deferred until the end of December. The Respondent also proposed that if additional mandatory days off were necessary, the matter would be negotiated with the Union, but that any such additional days would not be compensated at year end. (Although the Respondent's written proposal does not mention the number of additional mandatory days off, Edward Senff, the Respondent's president, testified that the proposal was for 10 unpaid days off per month.) The Respondent explained that it had experienced a loss in 1989, was facing substantial increases in health insurance costs, and had not yet had a rate increase approved by the Coast Guard.[18] The Respondent indicated that this was the best offer it could make, and urged the Union to accept it. Contract matters remained unresolved at the time of the spring meetings.

The spring meetings were held on April 8 through 10. The Respondent's board of directors met on the afternoon of April 8, and reconvened ''from time to time'' during the 3 days. The Respondent's annual shareholders' meeting was held on April 9, and the general employee pilot meeting and the Union's membership meeting took place on April 10.

Of the many subjects discussed at the meetings, one was the ongoing concern over falling traffic levels. The minutes of the Respondent's board of directors meeting indicate that traffic levels were projected to be no higher than those of 1989 and might be somewhat lower. Indeed, Senff reported that there was little confirmation of any vessel traffic at the time; however, Board Chairman Anthony Rico counseled that traffic information should improve on an almost daily basis.[19] The directors decided, however, not to lay pilots off before May 1. Instead, they instructed Senff to monitor the traffic level and report to the board by April 23.

At the union meeting on April 10, the Respondent's compensation proposal was presented to the union members for the first time. It was rejected in two separate tie votes (each 10–10), with the more senior pilots (including the Respondent's officers and directors) voting for the proposal, and the less senior members, including the Chi Chi Boys, voting against. Immediately following the vote, Union President Madjiwita left the room briefly; when he returned, he announced that the 1989 contract provisions would continue in effect during 1990.

Either later that afternoon or early the next day (April 11),[20] Directors Senff, Sciullo, Olsen, and Luckenbill (but not Rico, who had left town) discussed what the Respondent should do in light of the most recent traffic count. The directors decided to lay off the seven least senior pilots immediately, before they incurred the trouble and expense of reporting to their various duty stations. Except for Aho, all the laid-off pilots—Dobbins, Derf, Soderquist, Skorich, Ojard, and Kolenda—had voted to reject the Respondent's contract proposal and were members of the Chi Chi Boys.[21] In a letter dated April 11, Senff informed the pilots and the Union that the layoff had been implemented because of the decline in current levels of traffic and the absence of evidence that conditions would improve any time soon.

In a letter to Madjiwita dated April 13, Senff essentially reiterated the foregoing account. He explained that the directors had first decided not to lay anyone off before May 1, but to monitor traffic levels until April 23 and, on the basis of conditions existing on that date, to request the Union to poll its members to ascertain whether they preferred temporary layoffs or additional unpaid days off. Senff stated that comments and actions at the union meeting had led him to believe that the second option was unacceptable to the pilots, but that it was still available if it was what the members desired.[22] He also assured Madjiwita that as many pilots would be ''re-employed'' as traffic levels might warrant. The Union never thereafter indicated that a majority of the members favored additional unpaid days off over the seniority-based layoff.

Later in April, Pilot Skorich was recalled from layoff to handle an increase in traffic volume. However, by letter dated May 22, the Respondent informed the other six laid-off pilots that their layoffs had been converted to permanent discharges because there was no

[18] The Respondent's financial difficulties stemmed in part from the fact that it had not had a rate increase in several years.

[19] At the general employees' meeting, George Skuggen, who was then the U.S. Coast Guard director of pilotage for the Great Lakes, said there was too little information at the time to predict traffic levels.

[20] The testimony of Senff and Sciullo diverges on details, but is consistent regarding the directors' actions.

[21] The record does not clearly establish whether Aho was one of the Chi Chi Boys; Senff thought that he was.

[22] We disavow the judge's discussion of Attorney Jack Chestnut's role (if any) in drafting the letter.

foreseeable increase in vessel traffic. In fact, only 302 ships appeared in District 3 in 1990, a reduction of about 19 percent from the previous low of 372 in 1989.

On June 17, Pilot Donald Brennan spoke with Robert O'Brien, the president of Seaway Services Corporation (SSC).[23] Brennan said that he was busy and had little time between assignments. O'Brien replied to the effect that, if the pilots had voted to accept the Respondent's contract proposal, no one would have been laid off and the pilots would be getting their vacation time.

On September 27, Brennan spoke with Rico and George Luckenbill, another member of the board. Brennan had recently sent a letter to George Skuggen, who was then the Coast Guard's director of the Great Lakes pilotage staff, complaining that he had had to drive 500 miles in a car with bad brakes to accept an assignment at Duluth, when Rico and Luckenbill were available at Duluth but were not used. Brennan was asked if he was the author of the letter, and he said that he was. A spirited exchange of views followed, in which Rico accused Brennan of being an inferior pilot, Brennan accused Rico of not making any money for the Respondent, and Rico threatened to sue Brennan for slander.[24] Rico also asked if Brennan was one of the Chi Chi Boys, and Brennan affirmed that he was. Rico disparaged the name of the group, complaining that it ''disgraced the piloting.'' Rico asked what the Chi Chi Boys had expected to gain, and Brennan replied that they wanted to see where the money was going, and wanted to see some improvement regarding expenses. Rico rejoined that ''you're not going to be around here long enough to see any improvement.''

A. *The Allegedly Unlawful Statements*

The judge found that Olsen's remarks to Dobbins in early January violated Section 8(a)(1). He found that Olsen created the impression of surveillance by indicating that he knew of the Chi Chi Boys' activities and who some of the group's members were, and he found that Olsen unlawfully interrogated Dobbins concerning the group's purposes and about other pilots who might be involved. The judge further found that Olsen's comment that he had some ideas about cutting expenses that he would unveil at the spring meetings, which was delivered in a ''hard, harsh'' tone of voice, constituted a threat to retaliate against the Chi Chi Boys because of their protected concerted activities.

We adopt the judge's findings that Olsen unlawfully interrogated Dobbins and created the impression that the Respondent had the Chi Chi Boys' activities under surveillance. Unlike the judge, however, we are not persuaded that Olsen threatened Dobbins with retaliation. In the context in which it was uttered, Olsen's remark about cutting expenses is simply too vague to constitute a threat, or evidence of animus against the Chi Chi Boys. It is undisputed that the Respondent was in a financially difficult period: vessel traffic levels and revenues had been decreasing, and no relief was in sight. In those circumstances, it would be natural for Olsen, as one of the Respondent's directors, to have ideas about how to reduce costs. Olsen did not discuss his ideas, and Dobbins apparently did not ask him to. We find nothing in this conversation that would suggest that Olsen's unspecified ideas were directed toward the Chi Chi Boys in particular. Dobbins's description of Olsen's voice as ''hard'' or ''harsh'' lends a certain tone to the transaction, but does not, in our view, serve to convert his statement about cost cutting into a threat to retaliate against the Chi Chi Boys.

The judge found that O'Brien's statement to Brennan that if the pilots had accepted the Respondent's contract offer, there would have been no layoffs was the equivalent of saying that the Respondent had laid the seven pilots off in retaliation for the Chi Chi Boys' protected activities.[25] We disagree. Although the Respondent's written contract offer is not specific on this point, Senff testified that the proposal was for 10 mandatory days off, without pay, per month.[26] O'Brien was expressing his view that if the Union had accepted the Respondent's proposal, the Respondent would have been able to adapt to declining traffic levels through the use of unpaid days off, rather than through layoffs. We find, therefore, that O'Brien's comment to Brennan is not evidence of retaliation, but simply a statement of his view of what would have happened if the option of mandatory unpaid days off had been contractually available to the Respondent. Contrary to the judge, we find nothing coercive in O'Brien's remark.

Finally, the judge found that Rico threatened Brennan with reprisals for engaging in protected activities when he told Brennan that he would not be around long enough to see any improvement in the Respondent's expenses. We agree with the judge that Rico's remark constituted an unlawful threat of retaliation.[27] As

[23] Brennan was one of the Chi Chi Boys, but he was not laid off.

[24] The judge found that Rico's threat to sue Brennan for slander was not unlawful. No exceptions were filed to that finding.

[25] Although O'Brien was president of SSC, he was not an officer or director of the Respondent. However, the judge found that SSC and the Respondent are a single employer and, thus, that O'Brien's remark could properly be attributed to the Respondent. As we find nothing coercive about O'Brien's statement (and as we find that the layoffs were not unlawful), we need not decide the single employer issue. See part IV, below.

[26] Although the judge generally discredited Senff, the General Counsel relies on Senff's testimony in this regard, albeit in support of a different argument.

[27] The Respondent contends that Rico's statement was not coercive because Pilot Brown, who was present, did not perceive it as a threat. We reject that argument. It is well established that the test

Continued

we explain below, however, we do not believe that it can properly be viewed as establishing that the layoffs were implemented for unlawful reasons.

B. *The Layoff and Discharge of the Pilots*

The judge found that the Respondent laid off, and later discharged, several of the Chi Chi Boys in retaliation for their having engaged in union and other protected concerted activities, and therefore that the layoffs and discharges violated Section 8(a)(3) and (1). The Respondent excepts. For the reasons discussed below, we agree with the Respondent that the General Counsel failed to establish a prima facie case of unlawful motivation, and therefore that the complaint allegations in this regard must be dismissed. Because we find that the evidence does not support a finding of retaliatory motive, we need not decide whether the Respondent established that it would have laid the pilots off and discharged them even if they had not engaged in protected activities.

To begin with, we find that the unlawful statements discussed above do not establish retaliatory motivation here. Although Olsen improperly interrogated Dobbins and created the impression of surveillance, we are unwilling to infer persistent animus from those particular statements, which were isolated, relatively remote in time (3 months before the layoffs), and devoid of animus sufficient to establish an unlawful motive in themselves.[28] Nor do we think that Rico's threat to Brennan is evidence that the Respondent harbored animus toward the Chi Chi Boys at the time of the layoffs. Rico threatened Brennan in late September, more than 5 months *after* the layoff. Moreover, Brennan, to whom the remark was specifically directed, was not laid off either before or after his meeting with Rico and Luckenbill. Under these circumstances, we find that Rico's threat does not constitute persuasive evidence that the prior layoffs and discharges were unlawfully motivated.[29]

The General Counsel contends that certain other statements of the Respondent indicate unlawful motive:[30] (1) Rico's statement to Dobbins on April 9 that Dobbins was naive because he talked to the ''wrong people''; (2) Rico's remark at the shareholders' meeting that Connaughton and his ''entourage'' raised the same questions every year concerning finances, and Luckenbill's followup comment, ''F____ you, Connaughton''; (3) Rico's telephone statement to Pilot Opack that the layoffs were ''illegal''; and (4) Rico's remark to Pilot Derf, in August, that ''You have no business in this building. Please leave.'' and his instruction to an employee regarding Derf that ''You do not accept anything from this man.''[31]

Contrary to the General Counsel, we do not think the foregoing statements indicate that the layoffs were in reprisal for the Chi Chi Boys' protected activities. Rico's comment to Dobbins was vague and nonthreatening. Rico and Luckenbill's pique with Connaughton evidently was not of recent vintage, yet there is no contention that the Respondent ever retaliated against Connaughton.[32] The record does not reveal what Rico meant when he said the layoffs were illegal; he may have meant only that, in his view, the layoffs had not been properly authorized, because the directors had previously voted to retain all the pilots at least through May 1. Rico's remarks to and concerning Derf are likewise unexplained, and may have reflected only personal dislike; in any event, they were made long after the layoffs and discharges, as well as the filing of the charge (see fn. 29, supra), and their probative value thus is correspondingly reduced.[33]

Although we find no direct evidence that the layoffs were motivated by animus toward the Chi Chi Boys, we are not precluded from finding animus from all the surrounding circumstances. Thus, the judge found that the precipitate nature of the layoffs undermined the Respondent's contention that the layoffs were simply a reasonable business response to falling traffic levels.[34] Unlike the judge, however, we are not persuaded that the timing of the layoffs is suspect.

It is clear that the Respondent, in the early spring of 1990, was experiencing financial difficulties. Vessel traffic had dropped to a record low level of 372 ships

for whether a statement is coercive is an objective, not a subjective, one.

[28] See *Burdett Oxygen Co. of Cleveland*, 213 NLRB 19, 24 (1974).

[29] See *CEC Chardon Electrical*, 302 NLRB 106 fn. 2 (1991). In this regard, we note that the charge in this case was filed on June 8. Consequently, any animus on Rico's part could have been occasioned by the filing of the charge, rather than by the Chi Chi Boys' earlier actions.

Member Raudabaugh would not speculate as to whether the filing of the charge caused animus.

[30] These may be the ''profane and browbeating remarks'' to which the judge referred.

[31] Derf had gone to the Seaway Building, in which the Respondent and the Union had offices, to turn in his radio and pay his union dues.

[32] Although Connaughton was one of the Chi Chi Boys, he was not laid off.

[33] The General Counsel's repeated reliance on Rico's statements as evidence of unlawful motivation is somewhat peculiar, given that Rico apparently opposed immediate layoffs, was not present when the layoff decision was made, and demonstrated concern that it had not been properly authorized.

[34] The judge also relied on the unreliability of traffic forecasts in rejecting the Respondent's economic defense. The inherent problem with the judge's reasoning is that businesses, like other entities, often must make important decisions whether they have completely reliable economic forecasts or not. To infer unlawful motive from a lack of accurate forecasting is simply unfair to an employer that may be doing the best it can with the information it has. Moreover, the Respondent's initial action in this case was a *temporary* layoff; it did not convert the layoffs to discharges for another 6 weeks, when better information had been received. (See discussion in text below.)

during 1989, and would fall still farther—to 302 ships—in 1990.[35] Because the Respondent had not had a rate increase in several years, the decline in traffic led to a reduction in incomes of both the Respondent and the individual pilots. The Respondent's annual revenues had fallen from a little over $3.8 million in 1988 to just over $3 million in 1989, and would drop to slightly more than $2.5 million in 1990. The pilots' average earnings had fallen from $48,264 in 1988 to $29,709 in 1989; even after the layoffs in 1990, the average earnings of the remaining pilots increased only to $35,052, substantially below 1988.

Nor were 1990's dim prospects visible only in hindsight. At the time of the meetings on April 8–10, there were only about half as many ships in District 3 as there had been on the same dates in 1989. At the April 10 general employee meeting, Senff said that 1990 traffic levels were expected to be about the same as, or slightly below, those of 1989. According to the Respondent's records, there were a total of 28 ships in District 3 during April 1990, compared with 35 for April 1989. As of May 22, the date the layoffs of 6 of the pilots were made permanent, there had been a total of 56 ships in District 3, down from 69 as of the same date in 1989; shipping thus remained consistently about 20 percent below the 1989 level during this period.

Nevertheless, the judge found that the ''Respondent's claimed concern for decreased vessel traffic is false-sounding when the precipitate nature of these layoffs is considered.'' As the judge put it, ''All that intervened between an intention to monitor ship traffic for a time and the sudden layoffs was the contract rejection on a tie vote influenced mainly by the newer employees' opposition.'' He found that the Respondent's management was ''at least distraught, and more probably dismayed to the point of anger, over the contract rejection,'' and that the confusion and consternation following that event was evidence that ''management would choose a way to neutralize their frustration of purpose.''

The judge thus concluded that the Respondent implemented the layoffs out of anger and frustration at having its contract proposal rejected. In so doing, he seems to have ignored the explanation that the Respondent acted as it did, not out of anger, but because the rejection of its proposal left it with no other way of reducing its costs of pilotage in the face of decreasing traffic. According to Senff's testimony, on which the General Counsel relies, the Respondent's proposal provided for 10 mandatory days off per month, and would have altered prior practice by making those days off unpaid. The Union's rejection, however, meant that no such contractual option was available, and that any reduction of the pilot work force would have to be accomplished by layoffs.[36]

It is true, as the judge noted, that in laying the seven pilots off on April 11, the Respondent reversed its earlier decision to keep them employed through the end of April, while monitoring developments in traffic levels. That fact, coupled with the timing of the layoffs—soon after the pilots' vote rejecting the Respondent's proposal—arguably suggests unlawful motivation.[37] However, as Senff testified, the directors had decided to monitor the traffic in order to determine whether to impose mandatory days off.[38] But after the vote rejecting the Respondent's offer, the Respondent could not reduce operating costs by using mandatory unpaid days off. Given the existing and projected levels of traffic in District 3, it is not surprising that layoffs would have appeared inevitable. Moreover, as the spring meetings were breaking up, the pilots were preparing to leave for their duty stations. By acting swiftly, the Respondent was able to avoid inflicting on all concerned the trouble and expense of reporting for duty when a layoff was imminent. We find the Respondent's action in this regard to be a reasoned business decision. The evidence is insufficient to establish that the layoff was motivated by a desire to retaliate against the pilots.

Nor was the layoff decision irrevocable. In its April 13 letter to Madjiwita, Senff stressed that the choice of additional unpaid days off instead of a layoff was still available if the members preferred it.[39]

The judge discounted the Respondent's continuing willingness to change from a layoff to additional unpaid days off as ''illusory,'' because some of the pilots had expressed distrust of Madjiwita, who waited a month to address the members regarding this vital subject. We reject this reasoning. Having recognized the Union as the pilots' exclusive bargaining representa-

[35] G.C. Exh. 32 indicates that the pilots had handled 334 ships through June 30, 1990, or 32 more ships than appeared in District 3 for all of that year. The anomaly is only apparent, however; the record establishes that ships are handled by more than one pilot. Exh. 32 thus is evidently a record of the number of times each pilot handled any ship, rather than a count of the vessels themselves.

[36] Art. I, sec. 3, of the collective-bargaining agreement gives the Respondent the right to determine the number of its employees.

[37] In this regard, the General Counsel notes that on April 10, many of the pilots bid for areas of assignment, submitted to drug tests, signed their employment agreements, and were issued equipment used to perform pilotage duties. We agree with the General Counsel that those actions underscore the Respondent's intention, prior to the vote, to employ all the pilots at least for the time being.

[38] Senff gave this testimony in response to a leading question by counsel for the General Counsel.

[39] In the letter, Senff explained that the layoffs were implemented immediately because of low traffic level projections and because the Respondent wished to avoid the expense and inconvenience of having pilots report to their duty stations. Senff apologized for not sharing his reasoning with the Union and the members prior to the layoffs, pleading that he was new to his position as the Respondent's president, and stating that he was willing to work with the Union in the interests of the members and the Respondent.

tive, the Respondent was legally obliged to make its bargaining proposals to the Union, and we perceive no reason this offer should not have been directed to Madjiwita, who at the time was the Union's president, and with whom the Respondent had been dealing before the layoffs. Had the Respondent insisted on doing otherwise—as, for example, approaching the pilots individually—it might have been found to have violated its statutory duty to bargain in good faith with the Union.[40] That Madjiwita failed to act promptly in reply to the Respondent's April 13 letter does not change the fact that the offer was made, and apparently was bona fide.

Finally, we observe that, far from being distraught or angered by the pilots' rejection of its proposal, as the judge found, the Respondent's management—as individuals—may actually have been pleased. They had, after all, made an offer which, had it been accepted, would have called for mandatory unpaid days off for all the pilots, themselves presumably included. A layoff, by contrast, would and did affect only the least senior pilots—certainly not the directors and officers, whose average compensation for 1990 increased over 1989 as a result of being able to share the available work with fewer other pilots.[41] Thus (to put the worst face on it), the Respondent's 1990 offer may have been cynically designed to be rejected, and allow the senior pilots thereafter to garner all the available work for themselves, although giving the appearance of offering to share the work and the sacrifice with their less senior colleagues. Or, to be more charitable, the officers and directors may not have intended the result that occurred, but perhaps simply recognized a windfall when they saw it.[42] In neither case would their actions have been nobly motivated, but that does not matter here, because under neither scenario would their motivation have been to retaliate against the junior pilots for their protected activities.[43]

In support of the judge's decision, the General Counsel cites a number of circumstances regarding the layoffs and terminations which, he contends, undercut the Respondent's contention that it would have laid off and discharged the pilots even if they had not engaged in protected activities. Although the General Counsel does not explicitly assert that those circumstances also indicate that the Respondent acted from unlawful motives, such an argument could be made. For the reasons that follow, however, we find any such argument unpersuasive.

The General Counsel notes that the Respondent had never (or, at least, not since 1962) laid off a fully licensed pilot; thus, it might be inferred that the Respondent's action in laying off the pilots in 1990 was a departure from past practice indicating retaliatory motive. We decline to draw that inference. Two days after the layoffs, Senff plainly informed the Union that an increase in mandatory days off, rather than layoffs, was still an available option.[44] The Union never chose that option, but the fact that the Respondent offered, in substance, to abandon the layoffs negates an inference that they were implemented in retaliation against the Chi Chi Boys.

The General Counsel also points out that, at the time of the 1990 spring meetings, the number of available pilots already had been reduced, through attrition, from 25 in 1989 to 21; that the consensus of board members was that vessel traffic would be the same as, or slightly less than, the 1989 level; and that when the layoff decision was made, there were actually 2 more ships in the system than there had been earlier, when the directors had decided to employ all the pilots through the end of April. Nevertheless, according to the Respondent's records, there were only three ships in District 3 on April 10 and 11 (compared to seven and six, respectively, on those dates in 1989), with no significant increase in sight. Even with the number of U.S. pilots reduced from 25 to 21 (there were also 4 Canadian pilots available for duty), there was still an 8 to 1 ratio of pilots to ships in the system. Redundancy of that magnitude reinforces our finding that the layoffs were based on a reasoned business decision by the Respondent.

The General Counsel relies on certain discrepancies between the accounts given by Senff and Sciullo of the decision-making process leading to the layoffs. The General Counsel cites in particular the discrepancies concerning when the decision was made (the evening of April 10 or the morning of April 11), and whose idea it was. Unlike the General Counsel, we find nothing suspicious in the two directors' divergent accounts. As we have noted, they agree in pertinent part. Thus, under either version, the decision was made after the pilots voted to reject the Respondent's compensation offer, and the timing was related to a desire to avoid unnecessary expense and trouble in having the pilots report to their duty stations. Although the judge generally discredited the Respondent's witnesses, we find no cause for concluding, as the General Counsel urges,

[40] Employers must bargain with employees through unions, not with unions through employees. *General Electric Co*., 150 NLRB 192, 195 (1964).

[41] Therefore, even if, as the General Counsel suggests, the pilots' rejection of the Respondent's proposal was costly to the Respondent, it still redounded to the benefit of the senior pilots as pilots.

[42] Indeed, the Respondent argues, in support of its *Wright Line* defense, that the layoffs were inevitable precisely because the senior pilots never would have agreed to accept more unpaid days off.

[43] Member Raudabaugh would not speculate as to whether Respondent's offer was ''cynically designed to be rejected,'' or was otherwise not ''nobly motivated.''

[44] Because no violation of Sec. 8(a)(5) is alleged, we find no special significance in the Respondent's failure to offer the Union the choice of layoffs or unpaid days off *before* the layoff decision was made.

that the Respondent's account of the layoff decision is a fabrication simply because Senff and Sciullo's testimony is inconsistent in unimportant respects.

The General Counsel points to the fact that, after the layoffs, the remaining pilots worked substantially more than they had worked in 1989, and asserts that the Respondent did not retain enough pilots to operate safely and efficiently. We reject this line of argument. That the Respondent recalled Skorich from layoff in late April to help handle an increase in vessel traffic indicates that the layoff decision was, as the Respondent contends, based on traffic levels and not on a desire to retaliate against the Chi Chi Boys. Although the average hours worked by the remaining pilots did increase significantly from 1989 to 1990, the increase still did not raise their annual earnings to pre-1989 levels. Skuggen, the former Coast Guard director of pilotage, testified that he thought the number of pilots retained in both 1990 and 1991 was ample.[45] A Coast Guard letter dated May 21, 1991 (more than a year after the layoff), urging the Respondent to hire more pilots, was challenged by the Respondent for several reasons, among them that the Coast Guard's information on the number of pilots actually employed was incorrect.

Finally, the General Counsel observes that three pilot trainees were not laid off in 1990, as were the seven alleged discriminatees; instead, they were offered work running messages and shuttling pilots, whereas the laid-off pilots were not. Again, however, the Union was offered the option of increased days off rather than layoffs, but did not take it. Thus, although the Respondent offered the pilots and the trainees different alternatives to layoffs, the fact remains that the pilots were offered an alternative. In the absence of move persuasive indications of unlawful motivation, we are not convinced that the Respondent's differing treatment of the pilots and trainees indicates animus against the former group.

For all the foregoing reasons, we are unable to agree with the judge that the General Counsel established a prima facie case that the layoffs and discharges of the pilots were the result of unlawful motivation. We find that the Respondent's actions were a reasonable and lawful response to declining traffic levels, and were not taken in retaliation against the Chi Chi Boys. We therefore shall dismiss the complaint allegation in this regard.

IV. THE SINGLE EMPLOYER ISSUE

The judge found that the Respondent and SSC are a single employer, but did not recommend that SSC be ordered to remedy any of the violations found. The General Counsel excepts to the judge's failure to hold SSC jointly and severally liable for remedying the violations. We find no merit in the General Counsel's exception.

The only allegedly unlawful activity in which SSC was involved was O'Brien's statement to Brennan, assertedly imputing a retaliatory motive for the layoffs. We have found that neither O'Brien's remark nor the layoffs and discharges were unlawful. The remaining 8(a)(2) and independent 8(a)(1) violations were wholly the acts of the Respondent, not of SSC, and do not require a make-whole remedy. In these circumstances, we find that the usual cease-and-desist remedies against the Respondent will accomplish the purposes of the Act. Accordingly, we find it unnecessary to issue an order against SSC, and thus we need not decide whether SSC and the Respondent constitute a single employer.

ORDER

The National Labor Relations Board orders that the Respondent, Upper Great Lakes Pilots, Inc., Duluth, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with reprisals because they have engaged in protected concerted activities.

(b) Coercively interrogating employees about their protected concerted activities.

(c) Creating the impression that its employees' protected concerted activities are under surveillance.

(d) Permitting its management personnel to vote on labor contract renewals, or rendering office clerical assistance and support to Upper Lakes Pilots Association, District No. 3, International Longshoremen's Association, Local 444, AFL–CIO.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its office in Duluth, Minnesota, copies of the attached notice marked ''Appendix.''[46] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Re-

[45] Skuggen was not expressly discredited by the judge.

[46] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

spondent to ensure that the notices are not altered, defaced, or covered by any other material.[47]

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[47] The General Counsel contends that, after the close of the hearing, the Respondent lost its Coast Guard authorization to operate a pilotage pool and is, in effect, out of business. For this reason, the General Counsel urges that the Respondent be required to mail copies of the notice to the pilots instead of posting them. We find that this is an issue that is better suited to the compliance process, in which it can be determined whether there is a successor to the Respondent. Should it be found in compliance that the Respondent is, in fact, out of business and has no successor, it would be appropriate for the Respondent to mail, rather than post, the notices as the General Counsel requests.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with reprisals because they have engaged in protected concerted activities.

WE WILL NOT coercively interrogate employees about their union or other protected concerted activities.

WE WILL NOT create the impression that protected activities of employees are under surveillance.

WE WILL NOT permit board members or officers to vote on labor contract acceptance, nor will we render office clerical assistance and support to Upper Lakes Pilots Association, District No. 3, International Longshoremen's Association, Local 444, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

UPPER GREAT LAKES PILOTS, INC.

James L. Fox, Esq., for the General Counsel.

Thomas M. Vogt, Esq. (Felhaber, Larson, Fenlon & Vogt) and *Jack L. Chestnut, Esq. (Chestnut & Brooks)*, both of Minneapolis, Minnesota, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was heard at Duluth, Minnesota, during 3 trial days that comprised June 25–27, 1991. The charge was filed June 8, 1990, by Captain Howard C. Dobbins on behalf of himself and three other named individuals. A complaint subsequently issued on May 2, 1991, alleging, among other things, that Dobbins and six other individuals had been discriminated against because of their ''dissident'' activities regarding terms or conditions of employment. Primary issues of the case are whether the Board should assert jurisdiction over Upper Great Lakes Pilots, Inc. (Respondent) and whether various terminations from employment by this enterprise violated Section 8(a)(1) and (3) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of witnesses, and after consideration of briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

A. *Setting*

This case arises from utilization of the St. Lawrence Seaway in water transport. More specifically, the business activity involves service for salt water vessels carrying trade products to and from destinations on the three most inland Great Lakes. Such service is pilotage to most safely guide the ships in their transiting.

B. *Great Lakes Shipping*

Ships from around the world transport cargos that discharge or load at various ports of Lakes Huron, Michigan, and Superior. Such carriers have navigated through, or will return through, easterly waterways of the total seaway system. In the most inland portion of the seaway that this case concerns ship passage northerly of Lake Erie negotiates connecting waterways to emerge at Port Huron, Michigan, facing open waters of Lake Huron. Continuation from there would ordinarily be still further north or westerly to intended destinations of Lakes Michigan and Superior or of Canada. Typically the American ports of trade beyond Port Huron include Chicago, Illinois, and Duluth, Minnesota. Entry to Lake Superior for passage to Duluth requires transit on the St. Mary's River and locks at Sault Ste. Marie, Michigan, which bounds the Canadian border.[1] The shipping season in-

[1] This record contains frequent references to the ''Soo'' or ''Soo Locks'' (e.g., Tr. 160, 194, 261, and 548). This term is used commonly in the area as an abbreviation for Sault Ste. Marie, as the locking canal system permitting passage along an 18–24 foot sea level change on the river, or to the American and Canadian cities of the same name astride these locks. C. Hadfield, *World Canals, Facts on File Publications* (1986).

volved here is generally expected to run from mid-April to mid-December each year.

C. *Industry Highlights*

The salt water vessels sailing these described interior waters of the seaway are almost exclusively foreign-flagged. Illustratively the countries of registry are Greece, Liberia, and Panama, such foreign-flag presence being broken only by an estimated 1 percent of the time as with U.S. Lykes Line ships out of New Orleans, Louisiana.

Over the past decade the number of vessels bringing trade to and from these most inland Great Lakes has substantially decreased. In 1981 and 1982 the number of ships was about 600 for both years, this itself down markedly from the preceding 2 years. Such downward trend continued all through the 1980s. From 418 ships in 1987 a slight pickup to 437 followed in 1988, but again the number dropped to 372 in 1989. This case essentially concerns business, and labor relations events occurring at the commencement of the 1990 shipping season, which as it turned out resulted in only a comparative 302 ships.

Several causes of this decline in traffic were identified. They ranged from the general world economy to specifics such as now more commonly excessive vessel length, containerization methods, increased competition for two-way cargoing, and the switch in Canadian policy to making major grain shipments from the Pacific Coast rather than outbound on the seaway.

D. *Federal Regulation*

The ''Great Lakes Pilotage Act of 1960,'' as amended (46 U.S.C.A. § 9301), has permeating application to this case. This statute appropriately regulates merchant shipping by establishing standards and procedures for required use of capable pilots in ship navigation, setting charges for such service, and providing for intergovernmental arrangements with Canada for that country's equitable participation in reaching policy objectives, not the least of which is safety in maritime operations. A related and enabling memorandum of arrangements between Governments establishes three districts of the seaway; District 3 being the ''undesignated'' waters of Lakes Huron, Michigan, and Superior plus the ''designated'' waters of the Soo Locks, St. Mary's River, and marine approaches thereto. The United States Coast Guard is, as a practical matter, overseer of the American pilotage program.

E. *Description of Respondent*

The Pilotage Act authorizes formation and operation of privately owned enterprises as the official ''pool'' to furnish pilotage service for seaway shipping. Respondent is presently a Minnesota corporation for profit, evolved from an earlier organization named Lake Superior Pilots Association. It is the only pilotage pool that exists for District 3, and thus sole provider of the statutorially mandated service to vessels as they voyage through these Great Lakes and connecting waters.

Respondent is headquartered in a commercial property called the Seaway Building on Garfield Avenue in Duluth. At times material to this case in spring 1990 its board of directors consisted of Anthony Rico, Edward Senff, George Luckenbill, Andrew Sciullo, and Richard Olsen. The officers were just-retiring Rico as chairman of the board, just-elevated Senff as president, Luckenbill the first vice president and secretary, Sciullo the treasurer, and Olsen the second vice president. Auxiliary officers were William Rogers and Duane Evavold. Based on a management contract, and in keeping with practice of many years, Minneapolis-based Attorney Jack Chestnut administered Respondent's day-to-day operations. Respondent fulfilled its districtwide obligations by pilot dispatching offices in Chicago and Duluth, while the approximately 20 pilots in its employ were seasonally domiciled at dispersed points throughout the entire waterways system.

F. *Pilotage Function*

The occupation involved here is one of strict and specific distinctions based on marine experience and Coast Guard-administered licensing procedures. A pilot of complete capability is one fully registered by the Coast Guard, a status reached after time in training as a applicant pilot. This preliminary step is typically fulfilled by academy-type experience on the job. Additionally there are other categories such as a temporary registration for pilots over a certain age, and ''contract'' pilots used intermittently to buffer upsurges in vessel traffic within the district.

Pilots are generally divided into river, harbor, or translake specialties, but in any case commence their functioning by boarding a transiting vessel from a pilot boat. They preferably arrive in uniform, and the term ''Captain'' is customarily applied to them in recognition of those pilots having achieved fully registered status. Once on board ceremonial and operational introductions are done, and an assessment of effectiveness in communicating with master, officers, and crew of the ship to be piloted is made. This is primarily in reference to probable difficulty with other native languages, and to a lesser extent in reference to apparent qualifications and competence of crew personnel.

The key determinant of a pilot's exact role is whether the vessel is in, or about to enter, what the memorandum of arrangements scrupulously defines as ''designated'' waters. At such times the pilot must perform navigation of the ship, versus when in ''undesignated'' open waters where the pilot's role in navigation is advisory. During the ''designated'' phase of a passage the pilot's experience is generally utilized to evaluate currents, winds, unsuspected obstacles, and the presence of other watercraft encountered in the course of proceeding. The pilot also causes specific adjustments to maneuver the ship when drawn by a tugboat along the Soo Locks or as otherwise needed by sailing conditions. At these critical times the pilot has stationed himself on the bridge of the ship, utilizing instrumentation such as gyroscope and radar while personally speaking out rudder and engine commands for action by crew personnel. Weather advisorys, maintenance of desired speed, and ship construction features are all under constant consideration while piloting. At all times on board the pilot is subject to decisional authority of the vessel's master. This person, under customary powers of a ship captain, retains ultimate responsibility for successful completion of any voyage. In practice the pilot is fully relied on in the designated waters with which he is ordinarily so familiar, and called on only when probably helpful after open, undesignated waters are entered. In theory a pilot will disembark at particular ''change points'' within the district,

turning over continuing pilotage to a colleague. He then becomes inactive as to function until next assigned a ship according to a rotation system intended to bring equalization of work opportunity among the total pilot staff.

G. *Admitted Facts of Commerce*

The rates charged by Respondent for service of its pilots are annexed to the memorandum of arrangements as ''tariffs'' subject to change from time to time. The process of actual billing and ultimate payment is based on documentation called a ''source form,'' which reports the type and extent of service covered by any given pilotage assignment. From this original billing form Respondent receives payment as its basic business income.

A documentary basis exists in the record to recite that during calendar year ending December 31, 1990, Respondent, in the course and conduct of operating, derived gross revenues in excess of $50,000 from providing pilotage services to vessels engaged in foreign commerce by their presence in District 3.

H. *Respective Contentions*

General Counsel contends that Respondent is subject to the Board's jurisdiction notwithstanding that service is provided to foreign-flag vessels, themselves exempt, because the pilots have only a sporadic and collateral role in vessel passage. Although conceding the absolute necessity of what a pilot provides in experience and judgment, General Counsel argues that the exempt character of a foreign vessel does not attach to these American citizens for purposes to be served by the Board's public policy-based fulfillment of labor-management objectives.

Respondent contends that the pilots perform in a way that is ''intimately connected'' to passage of these foreign-flagged vessels, and for this reason share the doctrinal exemption for the ship thus barring an assertion of jurisdiction by the Board. Further, it is argued that joint United States-Canada regulation of the pilotage function preempts ''other conflicting law'' so as to dissuade the Board from asserting jurisdiction on policy grounds.

I. *Jurisdictional Analysis*

Although constitutional power exists to apply the National Labor Relations Act to foreign-flag ships while in U.S. waters, the Supreme Court held that Congress has expressed no intention that such power should be applied. Thus under more basic principles of maritime law, and factors of international relations, the jurisdictional provisions of the Act do not extend to such instances. *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963).

Respondent's main contention relies principally on *International Air Service Co*., 216 NLRB 782 (1975). In this case an American firm leased commercial airline pilots, navigators, and flight engineers to Japan Air Lines (JAL) for flying certain international routes. The Board held this cockpit function to be an essential element of the flying which JAL supplied its customers, and thus the American employer ''share[d] the [airline's] exemption from the Board's jurisdiction.''

In *National Transportation Service*, 240 NLRB 565 (1979), the Board reached a reconsidered view of the ''exempt entity'' principle in its application to assertion of jurisdiction. The ''intimate connection'' test was rejected, and *International Air Service* tacitly overruled. In substitution the Board held that once it was determined an employer providing services to an exempt user retained sufficient control over its employees to enable it to engage in meaningful collective bargaining, the Board's jurisdiction was satisfactorily established and should be asserted. The opinion in *National Transportation Service* termed the former intimate connection test as too vague, noting how the ''right of control'' test constituted ''a more objective, precise and definitive standard . . . .''

In *Community Transit Services*, 290 NLRB 1167 (1988), the Board asserted jurisdiction in such a context, finding that the employer retained control over ''a myriad of economic terms and conditions of employment, i.e., health and life insurance, vacations, paid holidays, overtime, sick and annual leave, and the stock ownership plan, as well as all other noneconomic personnel related matters.'' The opinion in *Community Transit Services* also found that fundamental rationale on the subject was consistent with intervening decisions of the Board in *Res-Care, Inc*., 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986).

In subsequent *Correctional Medical Systems*, 299 NLRB 654 (1990), the Board advised that jurisdiction would be asserted based on its adoption of summarized facts. These showed that although significant operational control was exercised by the exempt user, the employer under scrutiny retained extensive if not exclusive control over employee compensation, and that shared implementation of employment policies would not preclude meaningful collective bargaining.

Here such operational control as might be exerted by the master of a foreign-flagged vessel pursuant to that person's customary authority would not be determinative, when corporate bylaws, a collective-bargaining agreement, and highly structured employee compensation documents impinge on this work force. I am satisfied that meaningful bargaining within the controlling doctrine of *National Transportation Service* is present. This warrants an assertion of jurisdiction in this situation, particularly with its numerous United States points of contact and the absence of strong policy grounds for a contrary conclusion.[2]

J. *Holding*

Based on admitted facts of commerce, and the plain showing that Respondent's income derives from its arrangements in aid of foreign salt water vessel operators' transportation of freight and commodities between and among several States of the United States, I find Respondent's own operations to be an essential link in the transportation of such freight and commodities of interstate commerce as to constitute it an

[2] The numerous American ''contacts'' along Great Lakes shores or waterways of the boundary with Canada are in stark contrast to the fact situation of *Offshore Express*, 267 NLRB 378 (1983), where the Board considered crew boat and tugboat operations for the U.S. Navy at Diego Garcia Island in the Indian Ocean and declined to assert jurisdiction on grounds that the locale of employment was geographically remote, militarily restricted as to access, and subject to foreign sovereignty. The intergovernmental arrangements to which Respondent points here are comprehensive and detailed, but not in a way touching fundamental concepts of sovereignty in their application to Great Lakes pilotage.

employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act and one over which the Board would assert jurisdiction. *H P O Service*, 122 NLRB 394 (1958); see also *Longshoremen ILA Local 1418 (Lykes Bros.)*, 195 NLRB 8 (1972), for assertion of Board jurisdiction over ''Lykes Bros. Steamship Co., Inc. . . . a Louisiana corporation . . . .''

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Case Summary*

During 1989 Respondent's board of directors met occasionally for business purposes that included an ongoing concern for the diminishing revenue that would result if the trend toward lowered vessel traffic entering District 3 continued. By the end of that shipping season the situation appeared to warrant counteracting steps, in consequence of which the board of directors made personnel reductions in support staff and deferred certain yearend compensation for pilots as a matter of better managed cash flow.

An off-season exchange of bargaining proposals passed during February through March 1990 between Peter Madjiwita, then president of ILA Local 444, and Attorney Chestnut for Respondent. When bargaining did not result in a new agreement by the imminent start of the 1990 season, the pay patterns of 1989 were applied. However the board of directors also determined to lay off seven pilots before the official start of the 1990 season, one of whom was soon recalled. The remaining six were then notified of permanent termination, and the pool operated with an approximate 50-percent reduction of registered pilots for the balance of the 1990 shipping season.

B. *Other Business Entities*

Several separate entities have existed in carrying out Respondent's pilot-providing mission. The first is Seaway Services Corporation (SSC), an ''asset holding'' corporation at the same Garfield Avenue location as Respondent. SSC owns the Seaway Building, as well as other property used by Respondent such as pilot boats, automobiles, radios, and related assets used in deployment, travel, and on-ship functioning by pilots. Such assets are leased to Respondent, with SSC retaining legal title. The board of directors of SSC as the 1990 shipping season started was Rico, Luckenbill, Sciullo, Rogers, Retired Pilot Robert O'Brien, Attorney Chestnut, and Jan Ziegler, SSC's corporate secretary. O'Brien had been an officer of SSC during the 10 years of its existence, most recently its first vice president until being elevated to president of the organization at some point in 1990.

A second entity, one also located at the Seaway Building, is Central Dispatch, Inc. (CDI), a wholly owned subsidiary of SSC. This corporation employs dispatchers, messengers, and clerical personnel who coordinate and fulfill the supporting communication, transportation, and office needs of pilots called from their seasonal points of domicile to board, shuttle between, travel on, and disembark the ships in transit.

Lastly, General Business Services (GBS) is an operation located in Attorney Chestnut's Minneapolis law offices; one which provides clerical, bookkeeping, and other office services to Respondent. However a resolution of unspecified import was passed at Respondent's board of directors' meeting in April 1990, based on questioning of the expense and necessity for GBS to continue its services as in the past.

C. *The Union*

Approximately 30 years ago when a structured piloting industry seemed imminent under planned St. Lawrence Seaway completion and expected United States and Canadian complemental legislation, the ship pilots plying Lakes Huron, Michigan, and Superior affiliated with International Longshoremen's Association Local 1366. This membership subsequently obtained a separate ILA charter as Local 444, and after intervening years the collective-bargaining agreement originally effective for 1975–1976 was reached with Respondent. The contract is literally still in effect by operation of its automatic renewal clause, and thus customary subjects of recognition, earnings, benefits, worker assignment, employee discipline, and grievance procedure even now obtain. The labor agreement is also the basis of universal shareholder status by an express provision that all registered pilots enter into a stock purchase and redemption agreement with Respondent as a term and condition of employment. Further the labor agreement provides that Respondent ''shall have the right to select its employees and determine their number . . . .''

However the chief significance of this contract is to serve as a mechanism for annual supplements for what is truly of interest between the parties. This is the comprehensive ''wage classification, salary & benefits schedule'' for a particular season, in which pay rates are expressed in daily, annual, or other terms as set forth for the approximately five different pilot groupings. These groupings are well defined as to scope and manner of advancement; resulting essentially in the higher seniority board of director-weighted pilots dominating the higher pay groups, and the newer, younger, nonmanagement pilots comprising the several lower ones. Basic comparative pay differential runs on an approximate progression of 4 to 9 percent between the several groups.

Senff was president of the Union for several years during the mid-1980's, and then succeeded by Madjiwita. In the time frame subsequent to essential happenings of this case Donald Brennan, ranked 13th on the seniority list, has now been elected president of the organization. During Madjiwita's tenure Mindaugus ''Gus'' Balanda was secretary-treasurer, Paul Halverson vice president, and Melvin J. Brown a trustee.

D. *Single Employer Issue*

1. Introduction

This issue is present in the case by reason of a testified-to statement by O'Brien which General Counsel contends is a factor in drawing the requested inference of employment discrimination within the meaning of Section 8(a)(3) of the Act. With O'Brien now retired from his pilot occupation and off Respondent's board of directors, General Counsel seeks to establish by the theory of single employer status as between Respondent and SSC that O'Brien's statement is equally binding on Respondent as though made by an alleged supervisor and agent.

2. Corporate governance

The 54 shares of Respondent's class A voting stock was distributed among 18 pilot shareholders as of a compilation made in July 1990. The number of shares held ranged from six apiece by Luckenbill and Rogers, down to the qualifying minimum of one by several of those listed. Taking into account only the persons who are either directors or officers, over a majority (approximately 54 percent) of Respondent's voting stock is held by that group.

As to SSC all the pilots intending to work in the 1990 season owned stock in varying amounts. There are several other individuals, some familiar to the case as with Rico's nephew Ron Rico, CDI's main dispatcher George Glibota, and Ziegler, and some not, who own stock in varying amounts. These are relatively minor holdings, except for Attorney Chestnut and an individual named Muldoon. The persons who are either directors or officers of Respondent own approximately 45 percent of SSC stock, and Attorney Chestnut owns an additional 8 percent.

Drawing on recitations above it is seen that Rico, Luckenbill, and Sciullo served concurrently on the board of directors of both Respondent and SSC. Senff and Olsen are currently directors of Respondent and members of SSC's stock evaluation committee. Attorney Chestnut is the contracted-for manager of both Respondent and SSC, as well as being legal counsel to each entity.

3. Corporate operations

For purposes of this issue it is noted that Respondent is the sole client of SSC. Although street level offices of the Seaway Building are leased to unrelated tenants, Respondent and SSC share the second floor space. Respondent's management possesses, and in late 1989 exercised, the authority to reassign its Great Lakes Maritime Institute (GLMI) pilot applicant trainees from their function aboard vessels to dispatching, shuttle driving, and messenger work with SSC or its subsidiary CDI. In this same staffing adjustment Respondent's directors also effectuated the layoff of SSC and CDI support employees at both Chicago and Duluth.

4. Legal analysis

The courts and the Board have repeatedly set forth the test for a single employer. *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965); *Blumenfeld Theatres Circuit*, 240 NLRB 206 (1979), enfd. 626 F.2d 865 (9th Cir. 1980); *Rockwood Energy & Mineral Corp*., 299 NLRB 1136 (1990); *Hydrolines, Inc*., 305 NLRB 416 (1991). There should exist an interrelation of operations, common management, centralized control of labor relations, and common ownership. Also relevant are such factors as the use of common office facilities, common equipment, and the interchange of key personnel. Not all these factors must be found to establish the existence of a single employer situation, and no one factor is controlling. Single employer status ultimately depends on ''all the circumstances of the case,'' and is characterized by an absence of the arm's-length relationship found among unintegrated companies. *Operating Engineers Local 627 v. NLRB*, 518 F.2d 1040 (D.C. Cir. 1975).

Here SSC has barely the semblance of any independent existence. O'Brien, its chief executive officer, was indifferent to his appointment as president, has no office of his own at the Seaway Building, appears occasionally at the premises more as a visitor than an official, and gave no indication from his testimony that any business dealings between Respondent and SSC required his mental focus or prudent decision making. Facilities, property, and personnel are treated in undifferentiated fashion between Respondent and SSC as a practical matter, and the ''arm's length'' characteristic of noncommon entities is clearly missing. The situation is more than ill-concealed, it is instead that no effective attempt has even been mounted to draw any separateness of business purpose between these two nominally distinct corporations.

5. Holding

Based on the foregoing, I find that at all times material Respondent and SCC have been affiliated business enterprises with overlapping officers, commonly controllable ownership, an interlocking directorate, and the same individual as manager. They have formulated and administered a common labor policy affecting employees of the operations, and have shared common premises, facilities, and personnel with each other. I hold Respondent and SSC to be a single employer. See *Goodman Investment Co*., 292 NLRB 340 (1989).

E. *Pilot Complement*

1. Profile of staff

Of the approximately 20 pilots intending to commence the 1990 season, those highest in years of service were Rico and Luckenbill with 30 and 29 years, respectively. This was also the time when both retired from active or full-fledged piloting duties, but remained in management positions by retaining board of director membership and officer status. There followed from these two the comparably senior group of Rogers, Olsen, and Senff, all with about 20 years' employment and each in positions of management. The next general grouping was about six pilots of midseniority ranging from Michael Opack having 16 years through several more in double figures with Sciullo and Evavold attachable to this group by 9 years' service each. The final group of pilots were all under 9 years of employment and without management participation in Respondent.

Although these strong distinctions of seniority and managerial status exist, even newer pilots possess significant maritime experience. For example Tad Derf is a retired naval officer and Harold Dobbins has varied experience in Great Lakes shipping.

2. Manner of compensation

The annual shipping season officially runs from April 15 to December 15, and for basic pay purposes the wage classification schedule in effect during a given year states an annual compensation amount relating to that particular 8-month period. A ''daily,'' or as with 1989 a ''monthly,'' rate applies for piloting assignments before or after the official season. In addition to this basic compensation pilots have an expectancy of rebate for the mandatory days off taken during the shipping season, and for further compensation based on a formula relating to available days for assignment.

3. ''Chi Chi Boys''

Late in 1989 the newer pilots, augmented by Opack as an activist on the point, formed themselves into a loose bond to discuss their concerns over Respondent's expense levels and other management practices affecting employment. Their most recognizable gathering occurred in very early January 1990 at a Duluth restaurant, the name of which gave those identified with this interest group the name ''Chi Chi Boys'' The pilots aligning with this cause ranged from about 5 to 10 at varying times. They did not meet as a total group until a ''rump'' meeting in Superior, Wisconsin, twin city to Duluth, just prior to traditional spring meetings in 1990. The Chi Chi Boys had however, prior to that time, retained a Michigan attorney to evaluate their concerns, and had obtained identifying buttons which they wore openly at the spring meetings.

F. *Employee Status Issue*

Respondent contends the pilots of this case are not employees within the meaning of the Act because of their shareholder status and, alternatively, that they are managerial in nature. General Counsel counters these contentions by first arguing both that shareholder status is not uniformly enforced, and in any event does not as a matter of law strip the pilots of employee status. Further, General Counsel asserts that they do not have the managerial characteristics required by controlling Board cases in this area, because they lack any effective voice in formulating or effectuating management policies or their own terms or conditions of employment.

As to the matter of stock ownership, I do not believe the varying amounts held by any pilot is sufficient to constitute him as a person exempt from employee status under the Act. *Airport Distributors*, 280 NLRB 1144, 1150 (1986). The situation is one in which the unique nature of pilotage pool organizations led to the obligation of shareholder status, but the rigid bylaw requirements for office holding and stockholder voice are insufficient to give these individuals the type of effective authority in determining business policy that the Board requires before making such an exclusion. Specifically, the bylaws permit entrenched continuation of a board of directors and effectively deny any bylaws amending powers to nonmanagement shareholders. Cf. *Red & White Airway Cab Co*., 123 NLRB 83 (1959); *Sida of Hawaii*, 191 NLRB 194 (1971).

As to the subject of managerial status the lead case is *NLRB v. Bell Aerospace Co*., 416 U.S. 267 (1974). The opinion in *Bell Aerospace* defined managerial employees as those who ''formulate and effectuate management policies by expressing and making operative the decisions of their employer.'' *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), enlarged on this definition by adding elements of representing ''management interests'' and implementing ''employer policy.'' *General Dynamics Corp*., 213 NLRB 851, 858 (1974), provides instructive comment on what constitutes ''true managerial authority.'' The important technical and professional attributes of a job can be recognized without that ''attribute'' meaning there is a bearing on managerial authority. This is so when instead a ''routinely and rigidly regulated format'' exists for the occupational discipline being examined. I see the pilotage function as just such an instance; the technical differences being more a contrast between what is scientific as in engineering, and what is experiential as with judging the hazards of water navigation. In the latter instance it is astuteness of observation, the ability to sense collective effect of natural phenomena, and ingrained retentiveness about the characteristics of waterways being transited that is the essence of pilotage. *Southwest Airlines Co*., 239 NLRB 1253 (1978), is usefully compared as a case in which flight dispatchers exercised operational authority in furtherance of safety considerations with ''weather conditions'' taken into account. The vital attributes of pilotage do not, however, constitute the judgmental process attendant on contributing to business policy or its manifestation in the operation of an enterprise. Here there is thus insufficient basis to say that nonmanagement pilots, specifically including the seven alleged discriminatees of the case, have any effective voice in such formulation or effectuation of policy. For this reason they are entitled to normal employee status under the law.

This holding with respect to the employee status issue makes operative a conditional stipulation reached early in the hearing between the parties (Tr. 14–15). On this basis I further find that Upper Lakes Pilots Association, District No. 3, ILA Local 444, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

G. *Evidence Relating to Layoffs*

1. Documentary

Minutes of a board meeting held August 15, 1989, recorded the director's midseason concern for a comparatively ''severe reduction in traffic levels.'' In a subsequent meeting on October 23, 1989, a comparative drop in seasonal revenues of $630,000 at that time was reported to the directors, with the estimate of possibly double that ''if current traffic trends continued.'' On this basis the board formally laid off GLMI trainees Curtis and Hayes, as well as Contract Pilots Webster and Gainey. Additionally a support employee was laid off at both Chicago and De Tour Village, Michigan, plus a clerical employee of GBS as well as a one-third reduction ''of the office staff located in Duluth.'' At the board's final meeting of that calendar year on December 12, 1989, minutes noted ''the severe reduction in income due to substantially reduced traffic levels.'' Pilots were nonetheless voted compensation for their mandatory unpaid days taken during the 1989 navigation season.

2. Status of bargaining

On January 1, 1990, Rico wrote to all pilots summarizing what his letter of that date termed an ''extremely poor financial year.'' It also dealt with advice about certain benefit changes, and informed pilots of a mandatory drug and alcohol testing program to be installed. A main point of the letter was to emphasize the corporation's need for a rate increase, and it was this general background against which collective bargaining for the coming season was undertaken.[3]

By letter dated February 27 Madjiwita sent Respondent the Union's opening proposals for 1990. This read:

[3] All dates and named months hereafter are in 1990 unless indicated otherwise.

> On February 26, 1990 the Negotiating Committee of I.L.A. Local #444 held its initial meeting. The proposals for your consideration as a result of this meeting are as follows:
>
> (1) 20% wage increase—this is based on four (4) years of no wage increases and inflation rate of 5%.
>
> (2) Per diem to be increased to maximum allowable under the current structure for determining per diem rate.
>
> (3) Increase rest days to seven (7) days per month with pay, from the existing agreement of five (5) days.
>
> (4) Extra work—extra pay, which would also include pilots working during their scheduled rest days.
>
> (5) Company and union to form their respective committees to revise the Working Rules so that they would be compatible with present pilotage conditions. The revisions to be completed as soon as practical, but no later than the Spring of 1991.

Respondent's board of directors considered this proposal, and responded with a letter from Senff dated March 5 which stated:

> The Board of Directors of Upper Great Lakes Pilots, Inc. met today, March 5, 1990, and considered the proposals submitted by the Negotiating Committee of I.L.A. Local #444. After careful consideration of those proposals and of the anticipated revenues and expenses of the corporation for the coming year, the Board approved the following:
>
> 1. An 8% increase in base salary.
>
> 2. An increase in per diem to $42.00 per day.
>
> 3. Increase rest days to seven (7) days per month with pay for the months of June, July, August, September and October, with payments deferred until the end of December. Such rest days do not count for days available purposes. If a pilot voluntarily returns to work during his rest days, he will be paid for those days and those days will also count for days available compensation at the end of the year.
>
> 4. If the Board determines that additional mandatory days off must be taken, this will be negotiated with the Union. Any mandatory days off will not be paid at the end of the year.
>
> As you know, the corporation experienced a loss last year and is facing substantial additional expense in the coming season. For example, we have been advised that our health insurance costs will rise by over $400.00 per month, per man. Further, although we anticipate a rate increase, it is not yet certain what the amount of such increase will be or when it will be implemented. Under these circumstances, the Board has determined that the above offer is the maximum which the corporation can make for the 1990 season.

Madjiwita and Attorney Chestnut then conversed by telephone, during which time the former argued for a larger pay increase and the latter emphasized how the Coast Guard had not authorized Respondent a rate increase for over 5 years. From this another letter passed from Attorney Chestnut to Madjiwita, dated March 19, stating that Respondent's board was adhering to its earlier economic offer. This letter urged that membership of the Union accept the package.

3. Spring meetings

Shortly before the start of any shipping season, a series of meetings were traditionally held in early April concerning operation of this pilotage pool. In 1990 Respondent's initial board of directors' meeting was scheduled for 3 p.m. on Sunday, April 8, with the directors' meeting of SSC to follow later that afternoon. Respondent's annual shareholders' meeting was scheduled for 9:30 a.m. on Monday, April 9, and the general employees' pilots' meeting for the same time the following day. The Union also scheduled its membership meeting for 1:30 p.m. on Tuesday, April 10. All meetings were held in the Seaway Building.

Respondent's board considered vessel traffic projections at their meeting, the shareholders voted on corporate affairs, and the pilots bid for seasonal assignment as well as underwent mandatory drug testing procedure. The board of directors' meeting was a continuing one which resumed ''from time to time'' over the course of these 3 days.

When the union membership meeting occurred as the last phase of these customary spring meetings, Respondent's bargaining proposal was rejected by a 10-to-10 tie vote of all participating pilots, including those in management as board of directors' members or corporate officers. An obvious split of viewpoint during this twice-taken open voting showed that higher seniority pilots of management were pitted against the newer ones, who had already taken some group action based primarily on their concerns that corporate revenues were drained off too heavily by expense outlays. Madjiwita left the room briefly, then returned to announce that the rejection of Respondent's last offer meant the 1989 wage classification schedule would continue in effect for the new shipping season. After the voting and conversational aftermath subsided, Senff performed a canvass of available board members, also looking at the last-minute vessel traffic projections. From this consideration a management decision evolved to lay off seven pilots immediately and by seniority, rather than have them leave for seasonal stations without a likelihood of sufficient work to be done in the upcoming season. The decision was hastily communicated to several affected pilots, and confirmed by Senff's letter to each of them dated April 11. This written confirmation of layoffs was stated to be on behalf of the entire board of directors and a copy was sent to Madjiwita. It read as follows:

> The Board of Directors of Upper Great Lakes Pilots, Inc. has been closely monitoring vessel traffic within the St. Lawrence Seaway System along with projected traffic levels for the next several weeks.
>
> Due to the unprecedented decline in the current levels and the lack of evidence that traffic conditions will improve at the onset of the 1990 navigation season, we regretfully must inform you that we will not be able to provide you employment commencing April 15, 1990.
>
> The Board of Directors will continue to closely monitor traffic levels and will advise you of the first possible date of dispatch. We hope you will be available at that time.

4. Postlayoff occurrences

A more comprehensive explanation of the action taken was set out in another letter soon issued on April 13 over Senff's

signature and sent to Madjiwita. Here the several reasons for why a layoff was deemed necessary were given, and the option remaining from an earlier bargaining exchange of pilots agreeing to more mandatory days off during the season was reiterated as still being available. This letter is set forth in its entirety as attached Appendix A to this decision.

Madjiwita involved himself in also communicating to members about this unprecedented action, but no particular change of positions ensued. His communication was a letter dated May 11, enclosing a copy of Senff's letter dated April 13 as well as a later one dated May 3 relative to vessel traffic up to that point. His letter contained numerous recitations, but primarily advised members that the Union's executive board was not opposed to the layoffs in lieu of additional unpaid days off and that the Union's attorney had advised that the labor contract supported Respondent's ''absolute right'' to impose the layoffs.[4] A modification to the layoff action had been reemployment of Nick Skorich, the highest seniority of laid-off pilots, later in April. However Senff eventually issued a final letter on the subject dated May 22 to the remaining six employees that their layoffs had been, under the circumstances, converted to permanent discharge from employment then because of no foreseeable work. The remaining active pilots worked relatively frequent assignments that season in fulfilling all pilotage requirements of the traffic that did result.

5. Episodal factors

In early January a telephone conversation had ensued between Pilot Howard Dobbins and Olsen. Dobbins testified that Olsen questioned him about aims of the Chi Chi Boys, and whether Martin Connaughton, a midseniority pilot, was aligned with them. When Dobbins raised the matter of expenses Olsen answered with a hardened and harsh voice tone, saying that he, too, had some ideas about holding down expenses and would develop them at the spring meetings.

On the evening of approximately April 13 Opack was telephoned by Rico from Florida. Here Opack testified that Rico questioned him about circumstances of the layoffs, stating that he had not been consulted about what may have been ''illegal'' action.

In early June Opack and Sciullo had a brief conversation as they were together for a time on a ship under pilotage. Opack testified that he said there seemed to be insufficient pilots for the traffic, to which Sciullo did not disagree.

On or about June 17 Pilot Donald Brennan and O'Brien met passingly in De Tour Village. Brennan testified that he remarked about how busily he had been working, to which O'Brien replied that ''if you guys would have voted for the wage package . . . there wouldn't be anybody laid off work and you guys would be getting your vacation time.'' O'Brien's version does not differ markedly from Brennan's description of the words used during this exchange.

On or about September 27 Brennan appeared at Respondent's offices where Rico and Luckenbill were present. Brennan had just written a letter of complaint to Captain George Skuggen, then director of the Great Lakes pilotage staff. Brennan's letter was in protest of an urgent 500-mile drive across Michigan's upper peninsula and over to Duluth in a car with bad brakes. The trip was to fulfill a piloting assignment while senior pilots at Duluth were not utilized. Respondent's management pilots had a copy of this letter and it generated heated discussion among those present. Rico threatened to sue Brennan for slander given intimations he had made to the Coast Guard official. When questioned about what pilots ''hoped to achieve,'' Brennan answered that it mainly had to do with learning just how money was spent on the expense side of Respondent's operations. Brennan testified that this answer generated an angry reply from Rico that Brennan was ''not going to be around here long enough'' to find out.

H. *Credibility*

My assessment of credibility as between witnesses called by, or associated to, the parties has a controlling effect on how the overall case is decided. Generally I am considerably more favorably impressed with those witnesses advanced by General Counsel, and basically discredit Respondent's supporting witnesses. In particular instances I was highly impressed from a demeanor standpoint by Derf, Dobbins, and Brennan. They were each honest-seeming, doggedly consistent, persuasively possessed of candid, accurate-seeming memory details, generally unwavering during cross-examination and in my view worthy of being fully credited which I do. On the opposite scale I found Senff to be vague and unimpressive in his extensive presentation, found Sciullo to be evasive and dogmatic to the point of doubting his accuracy, found O'Brien to have testified with such hesitancy and lack of conviction as to warrant rejection of his testimony, and found Madjiwita a singularly discreditable witness whose awkward hesitations and frightened-seeming demeanor gave his various assertions a frayed, confused, and palpably false-sounding content. Apart from these frailties his initial denial of knowledge regarding events on April 11 was alone disqualifyingly improbable, and in sum I totally discredit his testimony in every material regard.

I. *Discussion of Unfair Labor Practice Issues*

1. Section 8(a)(1)

The testimony of Brennan provides a basis to find, as alleged, that O'Brien coercively told him Respondent had retaliated because of concerted activities engaged in by employees. On the later separate occasion of Brennan conversing with Rico and Luckenbill, a statement by the former that Brennan might not be with the organization sufficiently long to see improvement in terms and conditions of employment was a threat of plain enough import as to constitute an independent violation of the Act. I do not however consider Rico's remark about suing for slander to be an 8(a)(1) violation as alleged. The circumstances show instead that an animated exchange of opinions was being made, and it was merely out of these personal and temperamental countercharges that the word slander was used. I exclude this specific point from other unfair labor practice findings made in the case. I credit the testimony of Dobbins to the extent that in his telephone conversation with Olsen during January the latter uttered another threat of reprisal based on what appeared as group action by the pilots inimicable to the board

[4] This record contains a coincidental similarity of names. The Union's attorney was Fred *W.* Grady of Indianapolis, Indiana, while a Coast Guard official located in Washington, D.C., whose 1991 letter to Respondent is in evidence is named Fred *J.* Grady.

of directors' feelings.[5] I also believe that Olsen's comments, taken in their totality, constitute unlawful interrogation and creation of the impression of surveillance. What he said was basically probing and threatening, and gave the reasonable implication that Respondent was ominously open to reporting about group activities of the loosely known Chi Chi Boys.

In *David's*, 271 NLRB 536 (1984), the Board adopted findings that the impression of surveillance had been created by telling employees that their activities had been heard about and the name of one of them had been mentioned. This view of the episode was grounded in *American National Stores*, 197 NLRB 127 (1972), where the Board's opinion held that verbal statements in such regard need not be literally true, if instead they had a reasonable tendency to discourage employees in exercising their statutory rights. This was held to be the case by reasoning that such statements showed the employer as having ''sources of information'' about union activities, thus creating the impression of surveillance. *David's*, supra at 552. This rationale is sufficiently close to the Dobbins-Olsen telephone conversation to permit and require a finding that, as alleged, the impression of surveillance had been created by Olsen's aggressively persistent remarks.

2. Section 8(a)(2)

It was traditional in this setting that all pilots of the District 3 pool participate in affairs of the Union. In fact the fundamental labor contract contains a union-security clause requiring membership in the Union of all employees rendering pilotage services, after their full registration on examining board approval. At the 1990 spring membership meeting, as previously, senior board of director and corporate officer members participated equally with the rank and file, and for the most part constituted the voting block that would have approved Respondent's proposal. I believe these are activities that cannot be countenanced under the Act. Bylaws of the Union forbid corporate management from nominating for, or holding office in, any executive position of the Union. This minor disqualification does not, however, legitimatize Senff and others from the obvious self-dealing. Cf. *NLRB v. North Shore University Hospital*, 724 F.2d 269 (2d Cir. 1983).

In *Nassau & Suffolk Contractors' Assn.*, 118 NLRB 174 (1957), a divided Board affirmed earlier case rationale that when activities of supervisory personnel would ''lead employees reasonably to believe that the supervisors were acting for and on behalf of management,'' a finding of unlawful interference in the administration of a labor organization could result. In applying this principle to the facts of *Nassau & Suffolk*, the Board noted that individuals involved in the issue were ''not executives or officers [of the employer].'' Under a still-surviving test of examining ''all the circumstances,'' I conclude that corporate officials here, acting against a backdrop of known discord between the two interest groups, interfered with administration of the Union by their insistent and near-determinant exercise of voting with respect to their own formulated wage proposal for the new season. See *Power Piping Co.*, 291 NLRB 494 (1988). The threshold requirement of involvement with the collective-bargaining relationship, as discussed in *Hoyt, Brumm & Link, Inc.*, 292 NLRB 1060 (1989), is also plainly met in this situation.

Here it is also established that the Union had no independent resources of its own, and relied on Respondent for such basics as clerical service and space for union officers to be present even for simple discussion of union business. Madjiwita could not even state the amount of monthly rent paid by the Union for its symbolic presence in the Seaway Building. This near-total intrusion into the affairs of a labor organization constitutes impermissible assistance and support in violation of the Act. See *American Tara Corp.*, 242 NLRB 1230, 1242 (1979). Further, the de minimis principle of *Coamo Knitting Mills*, 150 NLRB 579 (1964), where use of company time and property extended to a mere ''3 percent of the total work force,'' is wholly inapplicable here. Cf. *Comet Corp.*, 261 NLRB 1414, 1430 (1982).

3. Section 8(a)(3)

a. *Vessel traffic projection*

Respondent relies heavily on this subject in its defense to the allegation of discriminatory action against pilots. Although it is true that a uniform downward trend in the annual number of ships within District 3 is shown, the concern is for whether this genuinely influenced the board of directors' action as taken late on April 10 or early the next day. More particularly, the incisive question is whether comparatively fewer vessels as start-of-season traffic was an actual reason for the abrupt layoff of pilots.

I am not persuaded to believe that this question permits an affirmative answer. The one consistent characteristic of Seaway shipping was its unpredictable patterns of usage and suddenly fluctuating change in numbers. Skuggen tellingly referred to traffic projections as ''never very successful,'' and that even industry sources that monitored shipping were not that reliable. When pressed on the point, Senff conceded he could not deny knowing that Skuggen voiced such an appraisal at some time during the spring meetings. As to Respondent's own attentions the date of April 23 had been officially fixed for a further keen look at the picture, although Senff was directed only to engage in the rather nonurgent activity of keeping track daily from the shipping reports. In fact, Senff testified that the board of directors had formally decided to continue all pilots in employment ''at least through May 1st.'' (Tr. 111.) There is nothing about this configuration that would suggest the layoffs would be made on the accelerated basis that was used.

b. *Canadian participation*

A second thread of Respondent's defense is found more in testimony of management witnesses than in its formal contentions. This has to do with the sharing of pilotage assignment with Canadians in the same occupation for District 3. Officially the current proportionate entitlement of Canadian pilots is 18.9 percent of overall opportunities; however, it is not sufficiently established from the evidence that this fully

[5] Contrary to Respondent's objection, I hold that General Counsel's amendment to the complaint which added par. 6(d) was allowable within the doctrine of *Nickles Bakery of Indiana*, 296 NLRB 927 (1989). This view is based on the close factual relationship of complaint par. 6(d) to the charge allegations, and that the conduct described in complaint par. 6(d) occurred within the 6-month period fixed by Sec. 10(b) of the Act. Cf. *Columbia Portland Cement Co.*, 303 NLRB 880 (1991). In this general connection, the transcript is noted and corrected.

and consistently occurred. The subject is one to which I give limited weight. This is because both the letter of the ''equitable'' sharing principle did not seem to meet its spirit, and there was an absence of documentary evidence that the 18.9-percent figure was truly realized. The record does disclose that Canadian pilots are employed in civil service, and without according great significance to the point there is a suggestion that the competition for pilotage assignments was so not important across the border. Perhaps the best indicator of how the subject fits into this overall picture is how Senff testified only vaguely how the sharing was ''supposed'' to work, and that dispatching rotation ''seems to work out halfway decent.''

c. *Role of Attorney Jack Chestnut*

Although not emphasized in case presentation, it is plain that this individual is instrumental in what Respondent is and does. That is not to say he preempted the board of directors, or was personally involved in the disputed decision to lay off. He is however so intertwined with the affairs of the total enterprise, that he effectively masterminds the entire coordinated business purpose. This is seen from his role on the boards of directors, his management contracts, the pervasive sort of legal accounting and business services provided by his law firm, his chairing of meetings, his role as administrator of the benefit funds, and lastly his predictably overall status as attorney for the entities involved and their subforms. Further, the affidavit of Rico, stipulated by the parties to be the equivalent of his live testimony, states that Chestnut ''prepares a letter for the pilots at the end of each shipping season regarding the confidentiality of their pay.''

I write separately on Chestnut's role because of a hidden significance seen to the letter dated April 13, on which Senff's ostensible signature appears. This letter, attached as discrete Appendix A to this decision, appears to have been drafted and issued by Chestnut himself. The composition, phrasing, and format all appear to be of Chestnut's well-polished making. Composition of the letter dated April 13 is a well organized and compellingly logical progression of thoughts that would do the utmost to legitimatize the drastic action just taken. Certain phrasings are more than coincidentally those of Chestnut. Four of its paragraphs begin with the pronoun ''I,'' as also comparably done in his own letter of July 23 to the field examiner. The ending phrase, ''I hope this,'' represents exactly how that subsequent letter also stated its closing passages. The indenting, paragraphing and complementary closing formats mirror the style of Chestnut's own letters when written on law firm stationery. Interestingly the secretarial initials ''jh'' shown on Chestnut's own correspondence, and on Respondent's letter dated March 5, which also gives every appearance of being drafted by Chestnut, but are absent on the April 13 letter. I leave to handwriting experts the question of whether Senff's cursively written ''signature'' on the April 13 letter is his own or was written for him. When the document was introduced at trial Senff's authenticating affirmance of its admissibility was first merely a distancing ''Uh-huh.''

None of this discussion is to fault or prejudice Respondent, or Chestnut acting on its behalf, from issuing a letter such as that dated April 13 with the appearance that it had been written by Senff himself. What I see instead is that Respondent and those aligned with its ''inner sanctums'' (Tr. 491) recognized the perilous consequences of what had been done by the board quorum, and it was time for prompt ''damage control'' to be mounted. Thus I believe, noting it as a matter of case flavor but without actual weight in the inferences eventually to be drawn, the letter dated April 13 was self-commissioned to himself by Chestnut for sophisticated handling of Madjiwita's request for explanatory information.

d. *Evaluation of layoff motivation*

Under *Wright Line*, 251 NLRB 1083 (1980), affd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), General Counsel has the initial burden to prove the union or other activity protected by the Act was a motivating factor in an employer's decision to make adverse action against an employee. If General Counsel meets this burden, the employer then has the burden to show it would have taken the same action even in the absence of the protected activity. Here the credited evidence is such that General Counsel has established a prima facie case as to each of the alleged discriminatees within the meaning of *Wright Line*. Respondent's overall defense fails of persuasiveness, and for this reason I find that the layoffs would not have occurred in the absence of attempts by the Chi Chi Boys to concertedly affect their terms and conditions of employment.

Respondent's claimed concern for decreased vessel traffic is false-sounding when the precipitate nature of these layoffs is considered. All that intervened between an intention to monitor ship traffic for a time and the sudden layoffs was the contract rejection on a tie vote influenced mainly by the newer employees' opposition. It may be conceded that Senff checked the latest Seaway Automated Information System (SAIS) on April 10 for actual vessels within the system, but this raw fact subordinates to both previous less acute intentions and to the inherent unreliability of early season projecting.[6]

It is plain that Respondent's management was at least distraught, and more probably dismayed to the point of anger, over the contract rejection. The immediate postvoting scene was termed a ''melee,'' ''confusion,'' and ''smoke and consternation,'' this tellingly enough of a description to infer that management would choose a way to neutralize their frustration of purpose. I have already alluded to the suspect nature of Respondent's April 13 letter, not as to its ghost writing for this is a matter of internal choice by the organization, but instead as to its uncommonly extensive attempt at defusing the entire situation. The reiteration of further mandatory days off as a continuingly viable option is noted; however, this factor is illusory given the Chi Chi Boys distrust of Madjiwita. Such distrust was not without validity when it is seen that he delayed any real attempt at dealing with these vital events until 4 weeks later in his letter dated May 11.

The 1990 shipping season required busy workloads being imposed on the remaining pilots. Such an admitted factor also suggests that the layoffs were without legitimate basis.

[6] Rico's affidavit states he is without recall of layoffs being discussed at 1990 spring meetings of the board. A conflicting interlineation on p. 3 of his affidavit is disregarded.

This was uniformly shown by the increased number of bridge hours worked by pilots during 1990. It is also notable that the Coast Guard was formally critical, in a letter dated May 11, 1991 (which Respondent rebutted), that change point requirements were not being met and a general understaffing of pilots was apparent. Finally the statement by O'Brien, imputable to Respondent as done by an agent, was revealing enough on the part of this person whose collegial activities would easily provide him knowledge of actual motivations harbored by Respondent's senior management personnel.

e. *Holding*

It is the combination of all such factors, coupled with profane and browbeating remarks from several board members against Chi Chi Boys' types, that results in my holding of discriminatory action in the layoffs taken and their ultimate conversion to discharge. I have considered the opinion of CPA Peter Medchill that the decision was reasonable and prudent, but cannot give this weight in the face of strong evidence compelling a contrary inference.

CONCLUSIONS OF LAW

1. Upper Great Lakes Pilots, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Upper Great Lakes Pilots, Inc. and Seaway Services Corporation constitute a single employer.

3. Upper Lakes Pilots Association, District No. 3, ILA Local 444, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

4. By telling employees that they have been laid off because of their protected concerted activities, Respondent has engaged in conduct violative of Section 8(a)(1) of the Act.

5. By threatening reprisals against employees for their engaging in protected concerted activities, Respondent has engaged in conduct violative of Section 8(a)(1) of the Act.

6. By coercively interrogating employees about their union or other protected concerted activities, Respondent has engaged in conduct violative of Section 8(a)(1) of the Act.

7. By creating the impression of surveillance of employees' union activities, Respondent has engaged in conduct violative of Section 8(a)(1) of the Act.

8. By corporate directors and officers voting on wage proposals at a membership meeting, Respondent has interfered with administration of the Union in violation of Section 8(a)(2) of the Act.

9. By rendering assistance and support to the Union, Respondent has engaged in conduct violative of Section 8(a)(2) of the Act.

10. By permanently terminating Tad Derf, Thomas Ojard, John Soderquist, Howard Dobbins, Dennis Aho, and Leroy Kolenda and temporarily laying off Nick Skorich, Respondent has discriminated for the purpose of encouraging union membership in violation of Section 8(a)(3) of the Act.

11. Except as found here Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom, and to take certain affirmative actions designed to effectuate the policies of the Act.

Specifically, I shall order Respondent to reinstate Tad Derf, Thomas Ojard, John Soderquist, Howard Dobbins, Dennis Aho, and Leroy Kolenda to their former positions of employment and make them whole for the layoffs of April 11. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also order that Respondent make whole Nick Skorich in the same manner for his temporary loss of earnings. Finally, I shall order Respondent to remove from its files any reference to these unlawful layoffs, and to notify the individuals in writing that this has been done and that the layoffs will not be used against them in any future way. See *Sterling Sugars*, 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]

APPENDIX A

Upper Great Lakes Pilot, Inc.
DISTRICT 3, GREAT LAKES PILOTAGE—LAKES SUPERIOR, HURON MICHIGAN
P.O. Box 6878 ★ 802 Garfield Avenue ★ Duluth, Minnesota 55802-6878 ★ Phone (218) 722–1425

April 13, 1990

Captain Peter A. Madjiwita
President
ILA Local No. 444
2458 Ferris
Lincoln Park, Michigan 48146

Dear Captain Madjiwita:

You have asked me to give you an explanation of the events leading up to my decision temporarily to lay off a number of employee pilots. I apologize for any confusion that has resulted. My intentions were directed to saving the company money and to saving the pilots any inconvenience they would experience in expending the costs and time involved in going to their stations and then subsequently being laid off.

The Board of Directors has been concerned about the continuing decline of levels of traffic and the number of employees who could service this traffic economically. Over the winter months, the possibility of layoffs was discussed with you and other union officials. At the April Board of Directors meeting, the Board decided from a policy standpoint to continue existing employees at least until May but to review the matter by April 23 and, on the basis of then-known traffic conditions, to advise the union of the number of employees that it could support in the near future. The union would then be requested to poll its members and advise the company whether temporary layoffs on a seniority basis should be imposed or if additional unpaid days off would be accepted by the membership across the board to accomplish the same result. I concluded from comments and actions at the union meeting that the latter was unacceptable. It is still available if that is what the members desire.

On April 11, I became aware that not only were traffic levels projected to be very low for the near term, but also that employees who would undoubtedly be temporarily laid off were leaving for their stations in accordance with their areas of assignment. On this basis, and with the above background, I consulted with three members of the Board of Directors who were available and decided to impose the temporary layoffs at this time to save everyone the expense and inconvenience that was bound to occur in the near future.

I apologize to you and your members for not advising you of this first. I am new to this position, but I am willing to work with you to solve all of our problems for the best interests of your members and the company.

I have since consulted with our legal counsel, Jack Chestnut, and he has advised me and will also advise the Board that these layoffs should be considered as temporary and that health benefits will continue for laid-off employees during the period of temporary layoff.

I have also consulted with Mr. Chestnut about your questions regarding requests for leaves of absence. He advises that these requests must be approved by the Board. Concerning benefits during unpaid leave, he suggested that he would probably advise the Board to honor health benefits during short requests, but that the cost of benefits would have to be paid by employees desiring them to be continued if the leave of absence was for a significant period of time.

It is my intention that just as soon as traffic levels warrant, as many employees as the traffic will allow will be re-employed and will continue so long as we don't experience further declines.

I hope this clarifies matters and that we can return to full employment very soon.

Very truly yours,

UPPER GREAT LAKES PILOTS, INC.
/s/ Captain E. J. Senff, Jr.
President